

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

May 26, 2004

IN RE:)	
)	
UNITED CITIES GAS COMPANY, a Division of)	DOCKET NO.
ATMOS ENERGY CORPORATION)	01-00704
INCENTIVE PLAN ACCOUNT (IPA) AUDIT)	
)	
PETITION OF UNITED CITIES GAS COMPANY)	
TO AMEND THE PERFORMANCE BASED)	
RATEMAKING MECHANISM RIDER TO ITS TARIFF)	

**ORDER DENYING IN PART AND GRANTING IN PART
THE CONSUMER ADVOCATE'S MOTION FOR RELIEF
UNDER RULE 37.02 OF THE TENNESSEE RULES OF CIVIL PROCEDURE**

This matter came before the Hearing Officer pursuant to the *Consumer Advocate's Motion for Relief under Rule 37.02 of the Tennessee Rules of Civil Procedure* ("Motion for Relief") filed by the Consumer Advocate and Protection Division ("Consumer Advocate" or "CAPD") on May 13, 2004. United Cities Gas Company (hereinafter "Atmos Energy Corporation" or "Atmos" or "AEC" or "the Company") filed its *Response of Atmos Energy Corporation to the Consumer Advocate's Motion for Relief under Rule 37.02* on May 13, 2004. Staff of the Energy and Water Division of the Tennessee Regulatory Authority ("Staff") filed *Staff's Responses to the Consumer Advocate's Motion for Relief Under Rule 37.02 of the Tennessee Rules of Civil Procedure and to the Consumer Advocate's Objections to the Motion for Approval of Settlement Agreement filed by Atmos Energy Corporation and the Staff of the Tennessee Regulatory Authority* on May 21, 2004.

Procedural History

The Procedural History of this matter is set forth in the Hearing Officer's *Order Granting in Part and Denying in Part Consumer Advocate's Motion to Compel Discovery*, issued on May 13, 2004, and *Order Amending Procedural Schedule*, issued May 13, 2004.¹ Briefly, the Hearing Officer granted additional discovery prior to the Consumer Advocate filing its objections to the joint *Motion to Approve Settlement Agreement* filed by Staff and Atmos on March 8, 2004. By agreement of the Parties, discovery was limited to the issue of "whether the proposed settlement agreement is in the public interest." The Consumer Advocate served Interrogatories and Requests for Production on Staff and Atmos on April 30, 2004. In response to these discovery requests, Objections to Discovery were filed by the Staff and Atmos on May 4, 2004. Responses to the Interrogatories and Requests for Production were filed by Staff on May 7, 2004 and by Atmos on May 10, 2004. At a Status Conference on May 10, 2004 to discuss the objections filed by Staff and Atmos, the Hearing Officer ordered Staff and Atmos to supplement their responses to Interrogatory No. 1 by May 11, 2004. Both Staff and Atmos filed their supplemental responses on the required date.² The objections, responses and supplemental responses to Interrogatory No. 1 discussed below are the subject of the Consumer Advocate's *Motion for Relief*.³

Interrogatory No. 1 and Responses

Interrogatory No. 1 was served on both Atmos and Staff on April 30, 2004. Interrogatory No. 1 reads as follows:

¹ See *Order Granting in Part and Denying in Part Consumer Advocate's Motion to Compel Discovery*, pp. 2-3 (May 13, 2004) and *Order Amending Procedural Schedule*, pp. 1-3 (May 13, 2004)

² *Supplemental Responses to Attorney General's Interrogatories and Requests for Production Served on the Tennessee Regulatory Authority Staff* (May 11, 2004) and *Supplemental Responses of Atmos Energy Corporation to the Attorney General's Interrogatories and Request to Produce* (May 11, 2004)

³ Other discovery issues related to the interrogatories and requests for production served on Staff and Atmos and not at issue in the Consumer Advocate's *Motion for Relief* are discussed in the Hearing Officer's *Order Granting in Part and Denying in Part Consumer Advocate's Motion to Compel Discovery* (May 13, 2004).

1. State each fact you rely on to support your contention that the proposed settlement is necessary and proper for the public convenience and properly serves the public interest.⁴

On May 4, 2004, Atmos filed the following Objection to Interrogatory No. 1:

The Company objects to this interrogatory on the grounds that it references an inapplicable governing standard. Without waiving this objection, the Company will provide a response to this interrogatory.⁵

Staff also filed an Objection to Interrogatory No. 1 on May 4, 2004, stating:

Interrogatory No. 1 references an inapplicable standard for Authority approval of the proposed settlement and improperly suggests that Staff contends the inapplicable standard should govern the proposed settlement.⁶

On May 10, 2004, Atmos filed the following response to Interrogatory No. 1:

Without waiving this objection, the facts supporting the Company's contention that the settlement agreement should be approved are recited in the order and tariffs in the original PBR docket (Docket No. 97-01364) and all documents filed by the Company in Docket Nos. 01-00704 and 02-00850.⁷

Staff filed its response to Interrogatory No. 1 on May 7, 2004, which read, in part:

Without waiving any objection previously stated with regard to this interrogatory, Staff relies on each fact already a part of the record in Dockets Nos. 97-01364, 01-00704 and 02-00850.⁸

A Status Conference was held on May 10, 2004, to address the objections to discovery requests. Relevant excerpts from these discussions show there was some confusion over the

⁴ *Attorney General's Interrogatories to the Tennessee Regulatory Authority Staff*, p. 4 (April 30, 2004) and *Attorney General's Interrogatories to Atmos Energy Company*, pp. 3-4 (April 30, 2004).

⁵ *Objections to the Attorney General's Interrogatories and Requests to Produce to Atmos Energy Company*, p. 1 (May 4, 2004).

⁶ *Objections to the Attorney General's Interrogatories and Requests for Production Served on the Tennessee Regulatory Authority Staff*, p. 1 (May 4, 2004).

⁷ *Responses of Atmos Energy Corporation to the Attorney General's Interrogatories and Requests to Produce*, p. 1 (May 10, 2004).

⁸ *Responses to Attorney General's Interrogatories and Requests for Production Served on the Tennessee Regulatory Authority Staff*, p. 1 (May 7, 2004).

standard Staff and Atmos were using in support of the proposed settlement agreement, the correct standard to be applied for approval of the proposed settlement agreement, and whether that standard was different from that for approval of a tariff, as illustrated below:

[Staff]: First off, I want to take some blame here to the extent that the discussion we're about to have is about the applicable standard. In the motion, towards the bottom of it, the parties to the settlement agreement state in summary: Approval of the settlement agreement is necessary and proper for the public convenience and properly serves the public interest. I want to be careful and point out that's not a representation as to the governing standard for anything. That's an allegation that's been made there. The standard that is referenced sounds a whole lot like the standard that's set out in, I believe, 65-4-107, which governs the approval of franchise agreements.... It's our position that that the standard is found in either 65-4-201 or 203.... So the nature of our objection is to state that this public convenience/public interest standard is not appropriate when considering whether to approve the amendment to the tariff.⁹

[Consumer Advocate]: The ground they intend to travel on they have now admitted is an improper ground. So the motion does not state the grounds upon which the TRA can grant the motion. So the only way for us to move forward and for me to get my discovery is to have them restate their grounds in the discovery requests [sic]. If you stick me with just this discovery request, then I am – I've asked the wrong question.

[Hearing Officer]: So what you're asking for is for them to respond with the correct standard under which they're intending to travel?

[Consumer Advocate]: Correct.¹⁰

[Hearing Officer]: Based upon what I've heard today, what I would like to do is order staff, since we're on that interrogatory, to file a supplemental response to identify what standard they're relying upon.

⁹ Transcript of Status Conference, pp 7-9 (May 10, 2004)

¹⁰ *Id.*, at p 17

[Staff]: Just a question of clarification. Is the standard that you are asking for the standard for approval of a settlement agreement in the generic sense or for approval of an amendment to a tariff? Or does the hearing officer consider them one and the same?

[Hearing Officer]: To the extent that the settlement agreement encompasses the amendment to the tariff, then I guess both, actually.¹¹

The Hearing Officer ordered both Staff and Atmos to file supplemental responses addressing the applicable standards upon which they intended to rely by May 11, 2004.¹²

On May 11, 2004, Atmos filed the following supplemental response:

It is the Company's position that the standard that should be applied to the new tariff and refunds to be implemented under the terms of the settlement agreement is the just and reasonable standard articulated by Tenn. Code Ann. §§ 65-4-117, 65-5-201 and 65-5-203. The Company has been unable to find any statute, case or order which articulates a separate general standard to be applied to settlement agreements presented to the Authority for approval.¹³

The supplemental response of Staff was filed on May 11, 2004, and reads, in pertinent part:

Regarding the applicable legal standard for settlement agreements submitted to the Authority for approval, to the extent that a separate standard exists apart from the legal standard that governs the substance of the controversy the proposed settlement seeks to resolve, the Staff is relying on the same standard applied by the Authority in approving the proposed settlements offered by the parties to TRA Docket Nos. 00-01022, 03-00118, and 03-00313.... The Consumer Advocate ... was a party to each of these dockets and to each of these settlement agreements. Therefore the Consumer Advocate should not need additional discovery to determine the applicable legal [sic] because it presumably relied upon the above-identified standard in seeking approval of these settlement agreements in these dockets. Each of these settlement agreements was approved by the Authority, either in whole or in

¹¹ *Id* at p 19.

¹² *Id* at p 48.

¹³ *Supplemental Responses of Atmos Energy Corporation to the Attorney General's Interrogatories and Requests to Produce*, p 1 (May 11, 2004).

part, and an issue regarding the applicable legal standard for approval was not raised before the Authority prior to or at the time of such approval. Regarding the applicable legal standard for Authority approval of a proposed amendment to a tariff, the Staff is relying on the standard mandated by Tenn. Code Ann. §§ 65-5-203(a) and 65-4-117(3).¹⁴

Consumer Advocate's Motion for Relief

The Consumer Advocate filed its *Motion for Relief* on May 13, 2004, seeking relief pursuant to Rule 37.02 of the Rules of Civil Procedure.¹⁵ In its *Motion for Relief*, the Consumer Advocate contends that Atmos and the Staff have refused to respond adequately to the Hearing Officer's ruling of May 10, 2004.¹⁶ The Consumer Advocate states: "AEC and the TRA Staff recognize in their Responses that the Hearing Officer directed them to provide the applicable standard. AEC and the TRA Staff have not done so. Instead, AEC and the TRA Staff reference alternative standards, one specific for review of a new tariff and one general but undefined standard for approval of settlements."¹⁷

Consequently, the Consumer Advocate's *Motion for Relief* requests the following rulings from the Hearing Officer:

1. AEC and the TRA Staff must promptly answer the discovery requests, including a clearly articulated standard for review of the Motion for Approval of the Settlement Agreement in question;
2. The Hearing Officer should modify the Procedural Schedule to allow the Consumer Advocate to file a reply no later than on May 28, 2004 at the close of business to the parties responses to the Consumer Advocate's objection to the proposed settlement; and

¹⁴ *Supplemental Responses to Attorney General's Interrogatories and Requests for Production Served on the Tennessee Regulatory Authority Staff*, pp. 1-2 (May 11, 2004).

¹⁵ This rule sets forth a variety of sanctions and remedies for failure to obey an order to provide or permit discovery. See Tenn. R. Civ. P. Rule 37.02 (2004).

¹⁶ See *Consumer Advocate's Motion for Relief under Rule 37.02 of the Tennessee Rules of Civil Procedure*, p. 2 (May 13, 2004).

¹⁷ *Id.*, at p. 3.

3. The Hearing Officer should reserve questions about further relief, including sanctions.¹⁸

Both Atmos and Staff filed responses to the Consumer Advocate's *Motion for Relief*.¹⁹

In its response, Atmos requested that it be awarded costs for defending the motion.²⁰

Discussion

The Hearing Officer notes that it was the Hearing Officer who ordered Staff and Atmos to reference "alternative standards" by requiring supplemental responses that encompassed both the standard for approval of a settlement agreement in the generic sense and the standard for approval of an amendment to a tariff. In their supplemental responses, Staff and Atmos both have provided citations to the legal standard on which they intend to rely for approval of the tariff. Atmos has stated that it has been unable to find a generic standard for approval of a settlement agreement. Staff has indicated that if a separate standard exists apart from the standard regarding the substantive issue (i.e. approval of the tariff), then it is the same as in dockets it cites in which a settlement agreement was approved, presumably without an articulated standard.

Based upon the content of these supplemental responses, the Hearing Officer finds that Staff and Atmos have provided answers in regard to the standards upon which they intend to rely in requesting approval of the tariff in question. Although neither Staff nor Atmos was able to provide an articulated separate standard for approval of a settlement agreement, both Staff and Atmos addressed the question and did not ignore the Hearing Officer's Order. Therefore, the

¹⁸ *Id*

¹⁹ *Response of Atmos Energy Corporation to the Consumer Advocate's Motion for Relief under Rule 37.02* (May 13, 2004) and *Staff's Responses to the Consumer Advocate's Motion for Relief Under Rule 37.02 of the Tennessee Rules of Civil Procedure and to the Consumer Advocate's Objections to the Motion for Approval of Settlement Agreement filed by Atmos Energy Corporation and the Staff of the Tennessee Regulatory Authority* (May 21, 2004)

²⁰ *Response of Atmos Energy Corporation to the Consumer Advocate's Motion for Relief under Rule 37.02*, p. 1 (May 13, 2004)

Consumer Advocate's *Motion for Relief*, insofar as it requests any additional responses to these discovery requests, is denied.

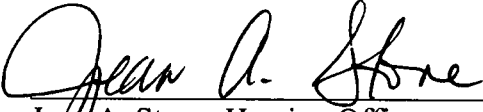
However, because of the aforementioned confusion over the standard upon which Staff and Atmos intended to rely, the Hearing Officer finds the Consumer Advocate's request to file a reply is reasonable. Therefore, the Consumer Advocate's *Motion for Relief*, insofar as it requests the procedural schedule to be amended to allow the Consumer Advocate to file a reply to the parties' responses to the Consumer Advocate's objection to the proposed settlement, is granted. If the Consumer Advocate chooses to file a reply, the reply shall be due no later than 4:00 p.m. on May 28, 2004.

Because the responses made by Staff and Atmos are in sufficient compliance with the Hearing Officer's Order, and because the Hearing Officer has granted the Consumer Advocate the opportunity to file a reply, the Hearing Officer finds that no further relief is necessary. Therefore, the Consumer Advocate's *Motion for Relief*, insofar as it requests the Hearing Officer to reserve questions about further relief, including sanctions, is denied.

IT IS THEREFORE ORDERED THAT:

1. The Consumer Advocate's *Motion for Relief* is denied in part and granted in part, as set forth above.
2. If the Consumer Advocate chooses to file a reply, to the parties' responses to the Consumer Advocate's objection to the proposed settlement, the reply shall be due no later than 4:00 p.m. on May 28, 2004.

3. Atmos Energy Corporation request to be awarded costs for defending the Consumer Advocate's *Motion for Relief* is denied.


Jean A. Stone, Hearing Officer